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2  
3 UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
4 AT TACOMA

5 MARK MCCLOUD,

6 Plaintiff,

7 v.

8 OFC. MOSELY, DR. VONN, PIERCE  
9 COUNTY MEDICAL DEPT., ST.  
10 JOSEPH HOSPITAL X-RAY DEPT.,  
DOC SHELTON (WCC) MEDICAL  
DEPT.,

11 Defendants.

CASE NO. C13-5675 RBL/KLS

ORDER TO SHOW CAUSE OR TO  
AMEND

12 Before the Court for review is Plaintiff's proposed civil rights complaint. ECF No. 6.  
13 Plaintiff has been granted leave to proceed *in forma pauperis*. ECF No. 5. On August 21, 2013,  
14 Plaintiff requested an extension of the Clerk's deadline to submit a service address list. ECF No.  
15 7. The Court has determined that it will not direct service of Plaintiff's complaint at this time  
16 because it is deficient. However, Plaintiff will be given an opportunity to file an amended  
17 complaint. Therefore, Plaintiff's motion for extension of time (ECF No. 7) shall be denied as  
18 moot in light of the deadline set forth herein for the filing of an amended complaint.

19 **DISCUSSION**

20 Under the Prison Litigation Reform Act of 1995, the Court is required to screen  
21 complaints brought by prisoners seeking relief against a governmental entity or officer or  
22 employee of a governmental entity. 28 U.S.C. § 1915A(a). The court must dismiss a complaint  
23 or portion thereof if the prisoner has raised claims that are legally "frivolous or malicious," that  
24 fail to state a claim upon which relief may be granted, or that seek monetary relief from a

1 defendant who is immune from such relief. 28 U.S.C. §§ 1915A(b)(1), (2) and 1915(e)(2); See  
2 *Barren v. Harrington*, 152 F.3d 1193 (9th Cir. 1998).

3 A complaint is legally frivolous when it lacks an arguable basis in law or fact. *Neitzke v.*  
4 *Williams*, 490 U.S. 319, 325 (1989); *Franklin v. Murphy*, 745 F.2d 1221, 1227-28 (9th Cir.  
5 1984). The court may, therefore, dismiss a claim as frivolous where it is based on an  
6 indisputably meritless legal theory or where the factual contentions are clearly baseless. *Neitzke*,  
7 490 U.S. at 327. A complaint or portion thereof, will be dismissed for failure to state a claim  
8 upon which relief may be granted if it appears the “[f]actual allegations . . . [fail to] raise a right  
9 to relief above the speculative level, on the assumption that all the allegations in the complaint  
10 are true.” See *Bell Atlantic, Corp. v. Twombly*, 127 S.Ct. 1955, 1965 (2007) (citations omitted).  
11 In other words, failure to present enough facts to state a claim for relief that is plausible on the  
12 face of the complaint will subject that complaint to dismissal. *Id.* at 1974.

13 Although complaints are to be liberally construed in a plaintiff’s favor, conclusory  
14 allegations of the law, unsupported conclusions, and unwarranted inferences need not be  
15 accepted as true. *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969). Neither can the court supply  
16 essential facts that an inmate has failed to plead. *Pena*, 976 F.2d at 471 (quoting *Ivey v. Board of*  
17 *Regents of Univ. of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982)).

18 Plaintiff purports to sue Officer Mosely of the Tacoma Police Department, Dr. Vonn (an  
19 orthopedic surgeon), Pierce County Medical Department, St. Joseph Hospital X-Ray  
20 Department, and the Washington Corrections Center (WCC) Medical Department. ECF No. 6,  
21 pp. 3-4. Plaintiff alleges that on February 20, 2009, he suffered injury to his ankle during his  
22 arrest when Tacoma Police Officer Mosely shoved him into the police car. He was taken to St.  
23 Joseph Hospital for x-rays, but because Officer Mosely refused to remove his cuffs, the x-ray  
24 was incomplete. Based on the incomplete x-ray, the St. Joseph X-Ray Department misdiagnosed

1 a severe sprain. At the Pierce County Jail, medical staff gave Plaintiff Vicodin, Percocet, and  
2 morphine over a three week period. When his ankle did not improve, Pierce County Jail medical  
3 staff took another x-ray and determined that Plaintiff's ankle was broken. Plaintiff was then seen  
4 by Dr. Vonn, an orthopedic surgeon, who also took x-rays and told him that he should have had  
5 surgery the same day of his injury. Surgery was performed and two four and one-half screws  
6 were placed in his ankle. In April 2009, Plaintiff was transferred to WCC where medical staff  
7 took x-rays and noticed a malformation of his tibia. They put him under anesthesia to remove  
8 the two screws but did not fix his tibia. ECF No. 6, pp. 3-4.

9 Plaintiff alleges that sometime in 2009, he hired a personal injury lawyer who was  
10 supposed to have filed a lawsuit on his behalf, but who ceased representing him in August 2010.  
11 *Id.*, pp. 4-5. Plaintiff's allegations against all of the defendants allegedly occurred on or before  
12 April 2009. *Id.*, p. 4. Plaintiff seeks \$2 million in compensatory "and/or punitive damages." *Id.*,  
13 p. 11. Plaintiff claims that all of the defendants "acted with deliberate disregard when [they]  
14 failed to provide medical care" in violation of the Fifth and Eighth Amendments. *Id.*, pp. 9-10.

15 Based on these allegations, Plaintiff has failed to state a viable claim under 42 U.S.C. §  
16 1983.

17 The Court will grant Plaintiff an opportunity to file an amended complaint so that he may  
18 attempt to cure his deficient complaint. Plaintiff is advised that in order to state a claim under 42  
19 U.S.C. § 1983, a complaint must establish "the violation of a right secured by the Constitution  
20 and the laws of the United States, and must show that the alleged deprivation was committed by  
21 a person acting under color of state law." *West v. Atkins*, 487 U.S. 42, 48 (1988). Section 1983  
22 does not provide a cause of action for violations of state law. *See Ove v. Gwinn*, 264 F.3d 817,  
23 824 (9th Cir. 2001).

1 Plaintiff must clarify whether he has any basis for pursuing a claim under § 1983. In the  
2 amended complaint, Plaintiff must write out short, plain statements telling the Court: (1) the  
3 constitutional right Plaintiff believes was violated; (2) name of the person who violated the right;  
4 (3) exactly what that individual did or failed to do; (4) how the action or inaction of that person  
5 is connected to the violation of Plaintiff's constitutional rights; and (5) what specific injury  
6 Plaintiff suffered because of that person's conduct. See *Rizzo v. Goode*, 423 U.S. 362, 371–72,  
7 377, 96 S.Ct. 598, 46 L.Ed.2d 561 (1976). If the person named as a defendant was a supervisory  
8 official, Plaintiff must either state that the defendant personally participated in the constitutional  
9 deprivation (and tell the Court the five things listed above), or Plaintiff must state, if he can do so  
10 in good faith, that the defendant was aware of the similar widespread abuses, but with deliberate  
11 indifference to Plaintiff's constitutional rights, failed to take action to prevent further harm to  
12 Plaintiff and also state facts to support this claim. See *Monell v. New York City Department of*  
13 *Social Services*, 436 U.S. 658, 691, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978).

14 Plaintiff must repeat this process for each person he names as a defendant, including any  
15 “John Doe” and “Jane Doe” defendants. If Plaintiff fails to affirmatively link the conduct of  
16 each named defendant with the specific injury suffered by Plaintiff, the claim against that  
17 defendant will be dismissed for failure to state a claim. Conclusory allegations that a defendant  
18 or a group of defendants have violated a constitutional right are not acceptable and will be  
19 dismissed. To avoid dismissal for failure to state a claim, Plaintiff must include more than  
20 “naked assertions,” “labels and conclusions” or “a formulaic recitation of the elements of a cause  
21 of action.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555–557, 127 S.Ct. 1955, 167  
22 L.Ed.2d 929 (2007). A claim upon which the court can grant relief has facial plausibility; in  
23 other words, a claim has “facial plausibility when the plaintiff pleads factual content that allows  
24

1 the court to draw the reasonable inference that the defendant is liable for the misconduct  
2 alleged.” *Iqbal*, 129 S.Ct. at 1949.

3 In the following paragraphs, the legal standards that *may* apply to Plaintiff’s claims are  
4 set forth. Plaintiff should carefully review the standards and amend only those claims that he  
5 believes, in good faith, are cognizable.

#### 6 **A. Liability of Parties**

##### 7 **(1) Pierce County Medical Department**

8 A governmental agency such as the Pierce County Medical Department normally cannot  
9 be sued under § 1983. *See Howlett v. Rose*, 496 U.S. 356, 365 (1990). The proper defendant is  
10 Pierce County. However, to hold such a municipality liable, Plaintiff must show the  
11 municipality itself violated his rights or that it directed its employee(s) to do so. *Bd. of County*  
12 *Comm’rs of Bryan County v. Brown*, 520 U.S. 397, 404 (1994). Under this theory of liability,  
13 the focus is on the municipality’s “policy statement, ordinance, regulation, or decision officially  
14 adopted and promulgated by that body’s Officers.” *City of St. Louis v. Praprotnik*, 485 U.S. 112,  
15 121 (1988) (quoting *Monell*, 436 U.S. at 690). A local governmental unit may not be held  
16 responsible for the acts of its employees under a respondeat superior theory of liability. *See*  
17 *Monell v. Dept. of Soc. Servs.*, 436 U.S. 658, 694 (1978). In order to sue a local governmental  
18 entity, a plaintiff must allege facts showing that any constitutional deprivation he suffered was  
19 the result of a custom or policy of the local governmental unit. *Id.*

20 If it is not Plaintiff’s intent to sue the municipality, then he must name the person or  
21 persons within the Pierce County Jail Medical department who allegedly caused him harm or  
22 show cause why he cannot name them. Plaintiff should describe what occurred, when it  
23 occurred, how person or persons failed to provide him with adequate medical care, and how he  
24 was harmed. To be liable for “causing” the deprivation of a constitutional right, the particular

defendant must commit an affirmative act, or omit to perform an act, that he or she is legally required to do, and which causes the plaintiff's deprivation. *Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir. 1978).

## **2) WCC Medical Department**

"Neither a State nor its officials acting in their official capacity are 'persons' under § 1983." *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 71, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989). Likewise, "arms of the State" such as the Department of Corrections or "WCC Medical Dept." are not "persons" amenable to suit under 42 U.S.C. § 1983. *Id.*, at 70. Accordingly, claims against the DOC would be subject to dismissal.

Plaintiff must name the individual or individuals within the WCC Medical Department who caused or personally participated in causing him harm. He must describe what each individual did, when they did it, and describe how this harmed him.

## **3) Private Physicians and Hospitals**

Plaintiff names Dr. Vonn and the St. Joseph Hospital X-Ray Department as defendants. However, the Ninth Circuit has consistently determined that private hospitals and doctors in § 1983 claims fail to come within the color of state law. *See Briley v. State of Cal.*, 564 F.2d 849, 855–56 (9th Cir.1977) (private hospitals not acting under color of state law unless the state is significantly involved in the private party's activities); *Watkins v. Mercy Med. Center*, 520 F.2d 894, 896 (9th Cir.1975).

The Supreme Court has concluded, in the prison context, that private individuals who contract with the state to provide services to inmates can, in some circumstances, be considered state actors. For example, a physician under contract to provide medical services to inmates was a state actor for purposes of § 1983. *West v. Atkins*, 487 U.S. 42, 55–56, 108 S.Ct. 2250, 101

1 L.Ed.2d 40. The court found determinative the fact that the state had a duty to provide adequate  
2 medical care to prisoners and that the state had delegated this duty to a private contractor. *Id.*

3 Here, however, Plaintiff has not plead facts sufficient from which it may be determined  
4 that Dr. Vonn or St. Joseph Hospital X-Ray Department were “under contract” with the state or  
5 that they were obligated to treat Plaintiff because of his status as an inmate.

6 **B. Fifth Amendment Claims**

7 Plaintiff claims that the various defendants failed to provide him medical care in violation  
8 of the Fifth Amendment. The due process clause of the Fifth Amendment, states that no person  
9 shall be deprived of life, liberty, or property, without due process of law. Plaintiff’s Fifth  
10 Amendment claim fails as a matter of law, because the Fifth Amendment due process clause  
11 does not apply to actions by local police officers or municipalities. “[T]he Fifth Amendment’s  
12 due process clause only applies to the federal government,” not state or local law enforcement  
13 officials. *Bingue v. Prunchak*, 512 F.3d 1169, 1174 (9th Cir.2008); *see also Castillo v.*  
14 *McFadden*, 399 F.3d 993, 1002 n. 5 (9th Cir.2005) (“[Plaintiff]’s citation of the Fifth  
15 Amendment was, of course, incorrect. The Fifth Amendment prohibits the federal government  
16 from depriving persons of due process, while the Fourteenth Amendment explicitly prohibits  
17 deprivations without due process by the several States.”).

18 **B. Eighth Amendment**

19 To establish a constitutional violation under the Eighth Amendment due to inadequate or  
20 denial of medical care, a plaintiff must show “deliberate indifference” by prison officials to a  
21 “serious medical need.” *Estelle v. Gamble*, 429 U.S. 97, 104, 97 S.Ct. 285, 50 L.Ed.2d 251  
22 (1976). Deliberate indifference to a prisoner’s medical needs is defined by the Court as the  
23 “unnecessary and wanton infliction of pain.” *Id.* Indifference proscribed by the Eighth  
24 Amendment may be manifested by a prison doctor’s response to the prisoner’s need, by the

1 intentional denying or delaying access to medical care, or the intentional interference with  
 2 treatment once prescribed. *Id.* “Medical malpractice does not become a constitutional violation  
 3 merely because the victim is a prisoner.” *Estelle*, 429 U.S. at 106.

#### 4 **C. Statute of Limitations**

5 The “appropriate statute of limitations for a 42 U.S.C. § 1983 claim is the forum state’s  
 6 statute of limitations for tort actions.” *Wilson v. Garcia*, 471 U.S. 261, 269 (1985). “In  
 7 Washington, that would be three years.” *Joshua v. Newell*, 871 F.2d 884, 886 (9th Cir.1989)  
 8 (citing RCW 4.16.080(2)). The statute of limitations runs from each discrete act. *See Nat’l R.R.*  
 9 *Passenger Corp. v. Morgan*, 536 U.S. 101, 113 (2002).

10 Plaintiff signed his complaint on July 29, 2013. ECF No. 6. *See, Houston v. Lack*, 487  
 11 U.S. 266, 276, 108 S.Ct. 2379, 101 L.Ed.2d 245, (1988); *Douglas v. Noelle*, 567 F.3d 1103, 1109  
 12 (9th Cir.2009) (*Houston* mailbox rule applies to Section 1983 complaints filed by pro se  
 13 prisoners).the date a document is provided by a pro se prisoner to prison authorities is treated as  
 14 the date of filing for statute of limitations purposes. Plaintiff alleges that his ankle injury and  
 15 medical treatment all occurred in 2009. ECF No. 6, pp. 3-4. However, his lawsuit was not filed  
 16 until July 29, 2013. Plaintiff must show cause why his claims should not be dismissed because  
 17 they are barred by the applicable statute of limitations.

18 As noted above, Plaintiff may file an amended complaint to cure the deficiencies noted  
 19 herein. Plaintiff shall present his complaint on the form provided by the Court. The amended  
 20 complaint must be **legibly rewritten or retyped in its entirety**, it should be an original and not a  
 21 copy, it should contain the same case number, and it may not incorporate any part of the original  
 22 complaint by reference. An amended complaint operates as a complete substitute for (rather than  
 23 a mere supplement to) the present complaint. Plaintiff should complete all sections of the  
 24 Court’s form. Plaintiff may attach continuation pages as needed but may not attach a separate



1 document that purports to be his amended complaint. The Court will screen the amended  
2 complaint to determine whether it contains factual allegations linking each defendant to the  
3 alleged violations of Plaintiff's rights. The Court will not authorize service of the amended  
4 complaint on any defendant who is not specifically linked to the violation of Plaintiff's rights.

5 If Plaintiff decides to file an amended civil rights complaint in this action, he is cautioned  
6 that if the amended complaint is not timely filed or if he fails to adequately address the issues  
7 raised herein on or before **September 27, 2013**, the Court will recommend dismissal of this  
8 action as frivolous pursuant to 28 U.S.C. § 1915 and the dismissal will count as a "strike" under  
9 28 U.S.C. § 1915(g). Pursuant to 28 U.S.C. § 1915(g), enacted April 26, 1996, a prisoner who  
10 brings three or more civil actions or appeals which are dismissed on grounds they are legally  
11 frivolous, malicious, or fail to state a claim, will be precluded from bringing any other civil  
12 action or appeal in forma pauperis "unless the prisoner is under imminent danger of serious  
13 physical injury." 28 U.S.C. § 1915(g).

14 **The Clerk is directed to send Plaintiff the appropriate forms for filing a 42 U.S.C.**  
15 **1983 civil rights complaint and for service. The Clerk is further directed to send a copy of**  
16 **this Order and a copy of the General Order to Plaintiff.**

17 Plaintiff's motion for extension of time (ECF No. 7) is **DENIED**.

18 **DATED** this 28<sup>th</sup> day of August, 2013.

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Karen L. Strombom  
United States Magistrate Judge